No. 83-2030 (12)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BOARD OF EDUCATION OF THE CITY OF OKLAHOMA CITY, STATE OF OKLAHOMA,

Appellant,

—v.—

THE NATIONAL GAY TASK FORCE,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

AMICUS CURIAE BRIEF ON BEHALF OF THE APPELLEE BY LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., AND THE FOLLOWING ORGANIZATIONS: NOW LEGAL DEFENSE AND EDUCATION FUND; THE LESBIAN RIGHTS PROJECT; GAY AND LESBIAN ADVOCATES AND DEFENDERS; THE BAR ASSOCIATION FOR HUMAN RIGHTS OF GREATER NEW YORK; THE COMMISSION ON FREEDOM OF SPEECH OF THE SPEECH COMMUNICATION ASSOCIATION; GAY TEACHERS ASSOCIATION, NEW YORK CITY; AND GAY AND LESBIAN EDUCATORS OF SOUTHERN CALIFORNIA. IN SUPPORT OF AFFIRMANCE

December 17, 1984

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INTEREST OF AMICUS CURIAE

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. ("LAMBDA"), appearing as *amicus curiae* with the written consent of the parties to the instant case, is a New York nonprofit corporation, and is the oldest and largest national gay and lesbian legal organization in the country. LAMBDA was organized in 1973 "to seek, through the legal process, to insure equal protection of the laws and the protect on of civil rights of homosexuals" and in furtherance of that purpose, "to initiate or join in judicial and administrative proceedings whenever legal rights and interests of significant numbers of homosexuals may be affected." LAMBDA Certificate of Incorporation ¶ 2.2(a).

LAMBDA has appeared as counsel of record or as *amicus curiae* in numerous cases involving the legal rights of gay men and lesbians in state and federal courts throughout the country, including major challenges to statutes which restrict the constitutional rights of lesbians and gay men, and in cases that have challenged laws, regulations, or private actions which discriminate against or restrict the basic civil rights of gay men and lesbians.

In accordance with its purposes, LAMBDA has a strong interest in this case, and submitted an *amicus curiae* brief to the United States Court of Appeals for the Tenth Circuit on behalf of the appellee, National Gay Task Force. LAMBDA is particularly concerned about the far-ranging impact of the challenged statute on the First Amendment rights of teachers and prospective teachers, gay and non-gay alike.

NOW LEGAL DEFENSE AND EDUCATION FUND ("NOW LDEF") is a nonprofit civil rights organization that performs a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was established in 1970 by leaders of the National Organization for Women, a membership organization of over 200,000 men and women in

more than 700 chapters throughout the United States. NOW LDEF is particularly concerned with the elimination of barriers that deny gay women, including lesbian teachers, economic and employment opportunities, and with challenging statutes that restrict the First Amendment rights of women and men.

THE LESBIAN RIGHTS PROJECT ("PROJECT") is a San Francisco-based nonprofit public interest law firm organized to protect and defend, through legal action and legal education, the rights of lesbians and gay men. The PROJECT provides representation in both individual and impact cases, conducts community education programs to inform lesbians and gays of their legal rights, holds lawyer education programs to improve the quality of advocacy on behalf of lesbians and gay men, and produces articles, bibliographies and litigation manuals for use by attorneys throughout the country. The PROJECT's attorneys are litigators experienced in constitutional and civil rights litigation, including both First Amendment and teacher cases, in state and federal courts in many areas of the United States.

GAY AND LESBIAN ADVOCATES AND DEFENDERS ("G.L.A.D."), incorporated in Massachusetts as Park Square Advocates, Inc., a nonprofit tax-exempt corporation, was founded to remedy the legal disabilities suffered by gay men and lesbians and is dedicated to the abolition of restrictions on the civil rights of homosexuals in the United States. Through its written materials and public speaking, G.L.A.D. educates the lesbian and gay community, the legal community and the public at large concerning the legal problems suffered by lesbians and gay men and the remedies available for those problems. Through its public interest litigation, G.L.A.D. participates in civil and criminal cases involving lesbians and gay men who have been discriminated against on the basis of their sexual orientation and works to vindicate and expand lesbian and gay civil rights.

THE BAR ASSOCIATION FOR HUMAN RIGHTS OF GREATER NEW YORK ("ASSOCIATION") is a professional association of the legal community concerned with the rights of lesbians

and gay men. Among the purposes cited in its certificate of incorporation are: "to further the science of jurisprudence as it relates to lesbians and gay men" and "to work with lesbian and gay interest groups and individuals to promote the achievement of equal rights for all people in our society." The ASSOCIATION pursues its purposes through provision of legal services on a *pro bono* basis within the lesbian and gay community, educational programs, a legal newsletter, and cooperation with community organizations such as Gay Men's Health Crisis, Inc., and national legal organizations such as LAMBDA. As lawyers concerned with the rights of all citizens to speak out on the legal issues surrounding homosexuality, the members of the ASSOCIATION have a special concern with the questions raised by the instant statute.

THE COMMISSION ON FREEDOM OF SPEECH OF THE SPEECH COMMUNICATION ASSOCIATION ("COMMISSION") was established by the Speech Communication Association in 1961 to promote the study and preservation of freedom of speech in the American educational system. The Speech Communication Association itself is a national professional organization of college and university professors and high school teachers which seeks to encourage research in and the teaching of speech communication. The COMMISSION also submitted an *amicus curiae* brief to the Tenth Circuit on behalf of the appellee, National Gay Task Force.

The GAY TEACHERS ASSOCIATION, NEW YORK CITY ("GTA") and the GAY AND LESBIAN EDUCATORS OF SOUTHERN CALIFORNIA ("GALE") are organizations founded to serve as support systems for and to address the needs of gay and lesbian teachers. The two organizations work to articulate the needs and problems of the thousands of gay and lesbian teachers in Southern California and metropolitan New York City, to insure the rights of gay teachers within those school systems, and to integrate gay teachers in the broader struggle for equal rights for gay men and lesbians. Both organizations have a strong interest in protecting the First Amendment rights of teachers and in challenging the serious infringement of

fundamental constitutional rights of gay and non-gay teachers imposed by the Oklahoma statute.

All of the organizations which have joined LAMBDA in this *amicus curiae* brief share with LAMBDA a deep concern about the severe impact, including the serious chilling effect, of the challenged statute on the exercise of First Amendment rights of all teachers, gay and non-gay, in Oklahoma and around the country.

SUMMARY OF ARGUMENT

Oklahoma's attempt to silence those who would speak out on issues relating to homosexuality violates the First Amendment and chills the expression of ideas and identity. Speech about homosexuality is neither obscenity nor incitement. Speech about homosexuality includes discussion of politics, civil rights, history, culture, family, and personal sentiment, often by people not themselves gay or lesbian. Such important expression is protected by the same strict constitutional safeguards as other speech.

The Oklahoma statute is not only an impermissible restraint on speech based on its content, but an abrupt departure from the well-established First Amendment rights of teachers recognized by this Court. The Tenth Circuit correctly found no legitimate state interest warranting such an invasive interference with expression at the core of public debate and at the heart of personal freedom.

ARGUMENT

POINT I

THE OKLAHOMA STATUTE VIOLATES THE RIGHTS OF TEACHERS AND OTHER CITIZENS TO SPEAK ABOUT HOMOSEXUALITY, EXPRESSION PROTECTED BY THE FIRST AMENDMENT.

The Oklahoma statute is on its face a content-based restriction on expression dealing with issues of homosexuality.[1] The statute is defective in its outright attempt to prevent individuals — gay and non-gay, public employees and private citizens alike — from voicing any but the most negative opinions on one particular subject. This kind of content-based ban on the exchange of ideas has been repeatedly rejected as anathema to democratic self-government and the fulfillment of individual freedom. *See, e.g., Police Department v. Mosley*, 408 U.S. 92, 96 (1972); *Cohen v. California*, 403 U.S. 15, 24 (1971).

The possibility that certain views are not shared by the majority, or are controversial, does not take those views outside the protection of the First Amendment. *Spence v. Washington*, 418 U.S. 405 (1974); *Papish v. Board of Curators*, 410 U.S. 667, 670 (1973); *NAACP v. Button*, 371 U.S. 415 (1963); *Gay Student Services v. Texas A. & M. University*, 737 F.2d 1317 (5th Cir. 1984), *appeal filed*, Oct. 31, 1984; *Fricke v. Lynch*, 491 F. Supp. 381 (D.R.I. 1980) (First Amendment protects gay high school student's choice of prom date). In fact, protection of such ideas is one of the classic functions of the First Amendment.

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1 This case does not present the issue of the validity of statutes prohibiting private consensual sexual activity between adults. Regardless of the constitutional protection due such intimate choice, however, individuals clearly have the right to discuss it, and even advocate, encourage, and promote it.

Moreover, when prejudice about gay people has been subjected to intense public debate and scrutiny in the free marketplace of ideas, the underlying stereotypes and resulting hostility have often been laid to rest. *See, e.g.*, 1978 defeat of California Proposition 6 ("Briggs Initiative").[2] In attempting to suppress expressions about homosexuality not conforming to its viewpoint, Oklahoma has violated the most basic First Amendment rights of all its citizens.[3] The Tenth Circuit correctly struck down this sweeping restriction on protected speech.

A) Speech about homosexuality is valuable and important, and is within the mainstream of public debate.

The Oklahoma statute prohibits a wide range of constitutionally protected speech of both public and personal significance. Speech about homosexuality punished by this statute includes expression about politics and civil rights. *See, e.g.*, *Acanfora v. Board of Education*, 491 F.2d 498, 500 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974) ("press, radio, and television commentators considered homosexuality in general, and Acanfora's plight in particular, to be a matter of public interest

2 In 1978, the California electorate rejected, by a wide margin, a proposal virtually identical to that subsequently adopted by the Oklahoma legislature as Section 6-103.15. *See* Ballot Pamp. Proposed Amendments to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1978), p. 29. The Briggs Initiative was condemned by both President Jimmy Carter and California Governor Ronald Reagan. The California vote climaxed months of public debate, in part initiated by singer Anita Bryant's campaign to repeal a Dade County, Florida ordinance barring discrimination based on sexual orientation.

3 Appellant asserts that "only teachers come within [the] ambit" of the statute's restriction on speech (Brief at 34). In fact, on its face, the statute reaches student-teachers and teachers' aides as well. Additionally, all those who wish ever to be a teacher or other school employee suffer directly the statute's impact. Finally, all citizens are harmed by the stifling of free expression, the mandating of state-enforced silence on an important issue, and the heightened stigma to those who believe in the right of Americans to private choice in intimate matters.

about which reasonable people could differ"). Under this statute, therefore, many Oklahoma residents could not advocate the repeal of criminal sodomy laws, although such reform is clearly a political issue of great importance.[4]

Public speech about homosexuality includes association with others of similar viewpoint to achieve political and social ends. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449 (1958); *Gay Students Organization v. Bonner*, 509 F.2d 652, 661 (1st Cir. 1974) ("communicative opportunities are even more important for [gay groups and their members] than political teas, coffees, and dinners are for political candidates and parties"). In *Bonner*, the First Circuit noted that

> beyond the specific communications . . . is the basic "message" . . . that homosexuals exist, that they feel repressed by existing laws and attitudes, that they wish to emerge from their isolation, and that public understanding of their attitudes and problems is desirable for society.

4 Courts have recognized that

> [t]he aims of the struggle for homosexual rights, and the factors employed, bear a close analogy to the continuing struggle for civil rights waged by blacks, women, and other minorities.

See, e.g., Gay Law Students Association v. Pacific Telephone and Telegraph, 24 Cal. 3d 458, 488 (1979). Indeed, civil rights for gay men and lesbians and sodomy law repeal are mainstream political issues. The State of Wisconsin has included sexual orientation in its comprehensive civil rights law. Wis. Stat. §§ 66.433, 101.22, and 111.36. Twenty-six states have decriminalized private, consensual, adult homosexual acts. At least forty-nine municipalities have extended statutory protection to gay people in private employment, housing, and public accommodation. Seven states have extended protection to lesbians and gay men by regulation or executive order in public employment. A person may not be found unsuitable for federal employment solely because that person is homosexual or has engaged in homosexual acts. OPM Memorandum, May 12, 1980. The Boards of Education of New York City and Washington, D.C. protect their teachers with policies of nondiscrimination based on sexual orientation. *See, generally*, Boggan, Haft, Lister, Rupp and Stoddard, *The Rights of Gay People* (1983); Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 Hastings L.J. 799 (March 1979); Rivera, *Recent Developments in Sexual Preference Law*, 30 Drake L.Rev. 311 (1981).

Id. Indeed, "one important aspect of the struggle for equal rights is to induce homosexual individuals to 'come out of the closet', acknowledge their sexual preferences, and to associate with others in working for equal rights." *Gay Law Students Association v. Pacific Telephone and Telegraph*, 24 Cal. 3d at 488 (Tobriner, J.).[5]

Without the ability to associate, there is no exchange of ideas or meaningful opportunity for public debate, yet the Oklahoma statute chills such assembly and thus prohibits the encouragement of legal reforms. The fact that the subject is homosexuality or the exercise of civil rights by gay people does not alter these hallowed principles of free government. *See generally*, Wilson and Shannon, *Homosexual Organizations and the Right of Association*, 30 Hastings L.J. 1029 (1979).

In addition to political speech and association, speech about homosexuality includes discussions of culture, literature, religion, and history, as well as current events. Just as gay people are everywhere, in every region, religious and ethnic group, economic class, educational level, and occupation, so homosexuality includes aspects of life and society beyond the mere physical intimacy of two human beings who happen to be of the same sex.[6]

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5 This is not to say that teachers could interrupt their classes or digress from the curriculum to discuss their personal sexual orientation, gay or otherwise. Such a step is already prohibited by other Oklahoma statutes and curriculum guidelines. *See* Okla. Stat. tit. 70 § 6-103.

6 "Homosexual adults are a remarkably diverse group." Bell and Weinberg, *Homosexualities: A Study of Diversity Among Men and Women* 217 (1978). Moreover, as experts have observed,

> [h]omosexuality encompasses far more than people's sexual proclivities. Too often homosexuals have been viewed simply with reference to their sexual interests and activities. Usually, the social context and psychological correlates of homosexual experience are ignored, making for a highly constricted image of the persons involved.

Id. at 24-25. *See also., e.g.*, Boswell, *Christianity Social Tolerance and Homosexuality* (1981); Tripp, *The Homosexual Matrix* (1975); National Institute of Mental Health Task Force on Homosexuality, *Final Report and Background Papers* (1972).

Under the Oklahoma statute, however, a teacher would have been unable to take part in, or speak favorably of, developments such as the reclassification of homosexuality by the American Psychiatric Association.[7] A prospective teacher in Oklahoma could not attend without fear a local university's presentation of the Broadway show *Bent* with its sympathetic treatment of gay people and their plight under Nazism. This statute would prevent teachers from participating in church-sponsored debates on theology and homosexuality within their denomination.[8] Such examples demonstrate the extent to which Oklahoma has invaded the rights of its citizens.[9]

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7 Increased understanding of diversity in sexual orientation resulted in the removal of homosexuality from the list of mental diseases by the American Psychiatric Association in 1973. 9 Psychiatric News 1 (1974). Other professional health organizations soon followed suit, some calling for legal and social reform to address anti-gay discrimination. *See* Resolutions of the American Psychiatric Association (1973, 1974), the Association for Advancement of Behavioral Therapy (1974), the American Psychological Association (1975), the American Medical Association (1975), and the American Public Health Association (1975).

8 The following churches and religious organizations have debated and endorsed resolutions calling for civil rights protection against employment discrimination on the basis of sexual orientation: the Lutheran Church of America, the Methodist General Conference, the Presbyterian Church (U.S.A.), the Society of Friends, the Episcopal Church, the American Baptists, the Unitarian Universalist Church, and the National Council of Churches. Other religious groups taking a similar stand include: The National Federation of Priests Councils (the largest association of Roman Catholic priests in the United States), the American Catholic Bishops, the Central Conference of American Rabbis, and the American Jewish Committee.

9 While all individuals are harmed by this kind of governmental censorship, gay people are hurt twice—first by its skewing of public debate on an issue of vital importance to them, and, again, by its invasion of their private lives. Gay people suffer when forbidden to meet, talk, and share their thoughts and beliefs openly and freely, consistent with the rights of others. Just as protected speech "conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well," so speech about homosexu-

B) Speech about homosexuality does not fall within any of the narrow categories of unprotected speech.

Clearly, speech about homosexuality does not necessarily, or indeed ordinarily, fall within any category of speech held by this Court to be excluded from the protection of the First Amendment. When speech about homosexuality constitutes defamation, obscenity, or "fighting words," such expression may be prohibited because these categories of speech fall outside the protection of the First Amendment. Any fortuitous content involving homosexuality, however, is irrelevant.

Notwithstanding appellant's claim, public speech about homosexuality simply does not constitute incitement to the commission of homosexual acts. This principle has been recognized, for example, by the numerous courts that have upheld the right of gay student groups to organize and be granted formal recognition by their respective universities. *Gay Student Services v. Texas A. & M. University*, 737 F.2d 1317 (5th Cir. 1984), *appeal filed*, Oct. 31, 1984; *Gay Activists Alliance v. Board of Regents of University of Oklahoma*, 638 P.2d 1116 (Okla. Sup. Ct. 1981); *Student Coalition for Gay Rights v. Austin Peay State University*, 477 F. Supp. 1267 (M.D. Tenn. 1979); *Gay Lib v. University of Missouri*, 558 F.2d 848 (8th Cir. 1977), *cert. denied sub nom., Ratchford v. Gay Lib*, 434 U.S. 1080 (1978); *Gay Alliance of Students v. Matthews*, 544 F.2d 162 (4th Cir. 1976); *Bonner*, 509 F.2d 652; *Wood v. Davison*, 351 F. Supp. 543 (N.D. Ga. 1972). This right has been upheld even in states where homosexual acts are still illegal. *Gay Lib v. University of Missouri*, 558 F.2d 848; *Gay Alliance of Students v. Matthews*, 544 F.2d 162; *Wood v. Davison*, 351 F. Supp. 543.

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ality is essential in order that gay people share in "the premise of individual dignity and choice upon which our political system rests." *Cohen*, 403 U.S. at 24, 26. The "freedom to think as you will and to speak as you think" is as vital to gay citizens as it is to all Americans, not merely for self-government, but for sense of self. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., joined by Holmes, J., concurring).

These courts have acknowledged that such protected speech and association, often for the purpose of political advocacy or social exchange, may not be presumed to involve sexual activity, let alone solicitation.[10] Indeed, this kind of speech and association is precisely what free people are entitled to do, and what a free society rejoices in their doing.

The Oklahoma statute, however, turns this constitutional principle on its head, making the subject matter of the speech, and not, for example, any asserted obscenity or libel, the grounds for censorship and punishment. The statute seeks to smother all but the most negative treatment of gay-related themes, casting an impermissible "pall of orthodoxy" over discussions of homosexuality by teachers and would-be teachers in any Oklahoma forum. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

Appellant seeks to justify this facially evident violation of the First Amendment by minimizing or dismissing the sweep of the statute, the number of those affected by it, and the importance of speech about homosexuality itself. Appellant thus contends that the statute should be seen as "very narrow," reaching nothing but speech directly inciting "criminal homosexual sodomy" in a manner likely to come to the attention of students (Brief at 33).[11]

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10 The principle that advocacy of the repeal of a criminal law does not constitute unprotected incitement to imminent lawless action was firmly established in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and *Hess v. Indiana*, 414 U.S. 105 (1973). It was for the purpose of reaffirming that principle and applying it to advocacy of the repeal of sodomy laws that the majority opinion below cited these cases. *NGTF v. Board of Education*, 729 F.2d 1270, 1274 (10th Cir. 1984). Appellant and its *amici* thus err in their contention that the Tenth Circuit relied exclusively and inappropriately on the *Brandenburg* test.

11 Appellant relies on the dissent below and its polemic conclusion that speech on homosexuality automatically "involve[s] advocacy of a crime *malum in se* to school children by a school teacher." 729 F.2d at 1277 (Barnett, J., dissenting). Both the appellant and the dissent thus play on the fears of a teacher's potential sexual exploitation of children as a means of obscuring the real effect and sweep of the statute.

In fact, the statute is not confined to in-class speech or a teacher's possible solicitation of sex with students, each dealt with adequately by other Oklahoma statutes. This is not a law narrowly tailored to prevent inappropriate sexual advances; rather, this is a regulation of speech outside the school in any forum, by any teacher or would-be teacher, on matters of public importance to all and of great personal significance to many.

C) The Oklahoma statute unconstitutionally deprives teachers of their protected right to speak about homosexuality.

Teachers have a right to voice their opinions on matters of public concern, including homosexuality, without fear of dismissal or other punitive measures. Although the First Amendment permits a state to regulate speech by its public school teachers somewhat more than speech by its citizenry in general, restrictions on speech by teachers must nevertheless meet stringent constitutional standards. *Pickering v. Board of Education*, 391 U.S. 563 (1968). States have a legitimate interest in restricting only that speech by teachers which causes a substantial and material disruption in the operation of the school. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 737-38 (1969); *see also*, *Acanfora*, 491 F.2d at 500-01 (junior high school teacher's public speech about homosexuality is protected under the First Amendment); *Aumiller v. University of Delaware*, 434 F. Supp. 1273, 1312 (D. Del. 1977) (First Amendment protects teacher's right to speak publicly on homosexuality).

Appellant and its *amici* would have this Court judge this statute by a standard never before recognized in First Amendment jurisprudence. They urge this Court to create a *per se* rule that speech about homosexuality by a teacher — even outside the school — is automatically disruptive of the school's operations and therefore devoid of First Amendment protection. They thus invert the requirement, laid down by this Court, that

a teacher's expression be regulated not for its content, but for its actual consequences.[12]

That the subject matter of a teacher's speech implicates homosexuality does not justify the abandonment of this protective standard in favor of a state-mandated silence or censorship. Indeed, such a departure from the balance carefully struck in *Pickering* and *Tinker* subverts not only teachers' rights to speak freely but also the First Amendment values that their expression signifies for all citizens. The decision of the Tenth Circuit stands within the shelter erected by this Court to secure the right of teachers to speak their minds on controversial issues. This Court should affirm that decision and the right of free speech it protects.

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12 As this Court held in *Tinker*, "[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." 393 U.S. at 508. "[A] mere desire to avoid . . . discomfort and unpleasantness" is also insufficient absent a showing of material and substantial disruption. *Id.* at 509.

POINT II

THE SWEEPING PROSCRIPTIONS OF THE OKLAHOMA STATUTE CHILL PROTECTED SPEECH.

The Oklahoma statute, by allowing punishment of teachers for "advocating . . . promoting or encouraging public and private homosexual activity," takes aim at protected expression in the broadest terms possible. Although the statute incidentally bans some speech concerning sex acts, it also restricts, both directly and indirectly, all but the most hostile expression about homosexuality. Because the statute "does not aim specifically at evils within the allowable area of state control, but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech," *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940), it chills protected speech and therefore must fall.

The very existence of such an overbroad statute chills the exercise of protected rights because individuals limit their speech to that which is unquestionably safe. *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Keyishian v. Board of Regents*, 385 U.S. 589. The Oklahoma statute's proscriptions on speech are so vague and so open-ended that a reasonable teacher or would-be teacher wishing to talk about the sensitive subject of homosexuality has to conclude that nothing is safe.

Appellant disingenuously contends that the statute was not designed to affect speech on homosexuality generally, and that a teacher would not be dismissed for anything but actual advocacy of imminent sodomy. The Tenth Circuit correctly rejected this argument, noting that the statute would permit dismissal of a teacher who testifies before the state legislature urging repeal of the state sodomy law. 729 F.2d at 1274. In fact, the statute goes even further than that. It contains no limiting standards and covers an almost limitless range of expression, burdening all speech on gay issues and involvement in gay organizations, whether by gay or non-gay individuals.

Any teacher or prospective teacher who, for example, participates in a panel discussion on the rights of gay people, wears a button on the street urging the repeal of the Oklahoma sodomy statute, or appears in a demonstration for gay civil rights — all activities outside the classroom — certainly could be said to be "advocating," "promoting," or "encouraging" homosexual activity. Indeed, even membership in the plaintiff organization, which, among other things, lobbies for repeal of state sodomy statutes, could well be seen as encouraging or promoting homosexual activity.

Under the statute, a teacher who acts as a faculty sponsor for a gay student organization would have good reason to fear dismissal for such action, even though the right of gay students to meet on school premises is guaranteed by The Equal Access Act. Pub. L. No. 98-377 (Aug. 11, 1984). Teachers or school aides who are active members in gay religious organizations[13] or denominations sympathetic to homosexuality, such as the Metropolitan Community Church, might well fear loss of their jobs as a result of such membership. An individual currently enrolled in a teacher training program at an Oklahoma university might not be willing to join a gay student group there, although such organizational membership is protected under the First Amendment. Thus, the statute compels teachers and many other Oklahoma residents to avoid legitimate, constitutionally protected activities.

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13 There are many gay religious groups, often recognized by, and affiliated with, the parent denominations. A partial listing includes the following: Affirmation (Mormon), Affirmation (United Methodists), American Baptists Concerned, Brethren Mennonite Council for Gay Concerns, Dignity (Catholic), Evangelicals Concerned, Friends Committee on Gay Concerns (Quaker), Gay People in Christian Science, Integrity (Episcopal), Lutherans Concerned, Orion Fellowship Alliance (Seventh-Day Adventist), Presbyterians for Lesbian and Gay Concerns, Seventh-Day Adventist Kinship, Unitarian Universal Office of Lesbian Concerns, Unitarian Universalist Gay Concerns, United Church Coalition for Lesbian and Gay Concerns (United Church of Christ), United Lesbian and Gay Christian Scientists, Congregation Beth Simchat Torah (Jewish).

Appellant claims, nevertheless, that a teacher would not necessarily be dismissed under the statute for sponsoring a gay student group or joining a gay church, and thus any chilling effect is caused by unreasonable fear. This argument ignores the sweeping language of the statute. Given the uncertainty as to its scope,

> [i]t would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery. The uncertainty as to the utterances and acts proscribed increases that caution in "those who believe the written law means what it says."

Keyishian, 385 U.S. at 601 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 374 (1964)).

Furthermore, even if some teachers would ultimately not be terminated for their speech about homosexuality, the mere threat of a hearing, and its attendant stigma, is as great a deterrent to the exercise of constitutional rights as actual dismissal.[14] *NAACP v. Button*, 371 U.S. at 433. "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960).

Appellant insinuates that any claims of a chilling effect are based on mere speculation. However, it is characteristic of a

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14 The statute authorizes a hearing without any showing of actual disruption. Thus, a hearing could be triggered by the unsubstantiated allegation of one person who learns of, or suspects, a teacher's homosexuality or positive attitude toward homosexuality. As a result, a school board ironically could expose expression or conduct that the teacher has been careful not to publicize. Such threatened investigation and exposure was the very tool used in the purges of gay people and other "un-American" individuals from government employment in the 1950's. Scholz, *Out of the Closet, Out of a Job: Due Process in Teacher Disqualifications*, 6 Hastings Const. L.Q. 663, 686 (1979).

chilling effect that those individuals whose speech and expression have been restricted cannot be identified.

> Chilling effect is, by its very nature, difficult to establish in concrete and quantitative terms; the absence of any direct actions against individuals assertedly subject to a chill can be viewed as much as proof of the success of the chill as of evidence of the absence of any need for concern.

Community Service Broadcasting v. FCC, 593 F.2d 1102, 1118 (D.C. Cir. 1978). *See also*, *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

The chilling effect of this statute is both real and substantial. It not only silences those who are already employed in the Oklahoma schools, but effectively restricts the expression of all those who may ever apply for employment as a teacher or teacher's aide in Oklahoma. By stifling their voices in the important public debate on homosexuality, Oklahoma has struck a blow at the First Amendment rights of all its citizens to speak and to hear such protected speech.

POINT III

NO ASSERTED STATE INTEREST WARRANTS SUCH A SWEEPING CURTAILMENT OF PROTECTED SPEECH ABOUT HOMOSEXUALITY.

In its efforts to save Oklahoma's assault on protected speech, appellant fails to make the constitutionally required showing of disruption, relying instead on a stigmatizing and false portrayal of homosexuality and its purported dangers to schoolchildren.[15] Unable to show any real harm, appellant exploits the unfounded and irrational notion, resulting from myth, ignorance, and prejudice, that homosexuality is transmitted to children by gay teachers.[16]

This Court should reject such unsubstantiated pandering to fear and emotion as a substitute for reason and solicitude for important constitutional rights. Without more,

> [f]ear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burned women. It is the function of speech to free men from the bondage of irrational fears.

Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., joined by Holmes, J. concurring).

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15 *Amicus* Washington Legal Foundation suggests that the statute is justifiable because it prevents the transmission of acquired immune deficiency syndrome (AIDS) (Brief at 12-13). This is both incorrect and offensive, and is typical of the reliance of appellant and various *amici* on prejudice and fear in order to defend an indefensible restriction on protected public speech.

16 Indeed, this statute does not *per se* prohibit the employment of gay teachers. In fact, such a statute would be unconstitutional as discrimination based on homosexual status. *See, e.g., Burton v. Cascade School District*, 353 F. Supp. 255 (D. Or. 1973), *aff'd per curiam*, 512 F.2d 850 (9th Cir.), *cert. denied*, 423 U.S. 839 (1975); *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969); *Morrison v. State Board of Education*, 1 Cal. 3d 214 (1969). *See also, Robinson v. California*, 370 U.S. 660, 665-67 (1962).

Gay teachers do not make children homosexual. The intimation that gay teachers have a deleterious effect on the sexual development of schoolchildren, let alone proselytize or advocate criminal sodomy, has been consistently refuted.[17] Simply put, there is no scientific evidence which supports a "contagion" theory of homosexual development.

Whatever the origins of homosexuality — whether biological, cultural, psychological, or a combination thereof — the studies show conclusively that it is not a matter of imitation. *See, e.g.*, Weinberg, Bell and Hammersmith, *Sexual Preference: Its Development in Men and Women* (1983); Marmor, *Homosexual Behavior: A Modern Reappraisal* (1980); National Institute of Mental Health Task Force on Homosexuality, *Final Report and Background Papers* (1972). As one authority notes: "If it were merely a matter of imitation, then there would be little or no homosexuality, because for centuries almost all people who are homosexual have come from heterosexual families." Calderone and Johnson, *The Family Book About Sexuality* 114.[18] Moreover, one of the leading scientific experts on the subject of gay sexuality has expressly rejected

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17 Similarly, the notion that the sexual abuse of children is somehow related to homosexuality is equally offensive and spurious. The overwhelming majority of reported criminal child molestations involve adult male molesters of young girls. *See, e.g.*, State of Oregon Department of Human Resources, *Final Report of Task Force on Sexual Preference* 36-41 (Dec. 1, 1978).

18 Studies conducted of parent-child relationships have demonstrated beyond a doubt that children raised by gay parents are just as likely to be heterosexual as those raised by heterosexual parents. *See* Hotvedt and Mandel, *Lesbians As Parents: A Preliminary Comparison of Heterosexual and Homosexual Mothers and Their Children* (Research Study funded by the National Institute of Mental Health (1982)); Green, *Sexual Identities of 37 Children Raised by Homosexual or Transsexual Parents*, 135 Am. J. Psychiatry 6 (1978).

the imitation theory, concluding that gay teachers do not influence the sexual orientation of their students.[19]

The anti-gay prejudice relied on by appellant has beeen repudiated by major educational organizations.[20] Many groups, including the American Federation of Teachers, the United Federation of Teachers, the National Education Association, the National Council of Teachers of English, and the Washington, D.C. and New York Boards of Education, have formally disavowed discrimination against gay and lesbian teachers. These organizations have declared that the relevant qualification for teachers is their performance on the job, not their sexual orientation or the expression of their personal views outside the classroom. This conforms with the law as expressed in such cases as *Tinker* and *Pickering*.

The Oklahoma statute relies on, indeed, promotes, discredited and harmful myths and stereotypes about gay people and teachers. It chills their speech, burdens their lives and livelihood, and prevents the exchange of ideas and self-expression which the First Amendment so clearly safeguards. By imposing on its citizens a taboo of silence and an atmosphere of accusation when legitimate speech about homosexuality is attempted, Oklahoma has violated the constitutional protections for thought and speech which keep this society open and its people free.

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19 "People don't believe that a child is heterosexual because the teacher is . . . . Do they believe a child in Catholic school will become celibate because the nuns are?" Interview of Martin Weinberg, Boston Globe, Feb. 20, 1982, at 16. In 1978, Ronald Reagan made a similar observation in opposition to a proposed California measure virtually identical to the Oklahoma statute. *Two Ill-Advised California Trends*, Los Angeles Herald-Examiner, Nov. 1, 1978, at a-19.

20 Moreover, no state code expressly bars gay and lesbian individuals from the teaching profession. Scholz, *supra*, at 692.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of the Rules of the Supreme Court of the United States, the undersigned member of the Bar of the Supreme Court of the United States hereby certifies that three (3) copies of the preceding *Amicus Curiae* Brief on Behalf of the Appellee by Lambda Legal Defense and Education Fund, Inc., were mailed on December 17, 1984, at the U.S. Post Office in New York City, with first class postage prepaid, to counsel of record for the parties at the addresses listed below, as required by Rule 28.3 of the Rules of the Supreme Court.

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